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In the Supreme Court of the United States.

SAMUEL B. DOWNES, Plaintiff in Error, vs. GEORGE R. BIDWELL, Defendant in Error.	No. 507.

Supplemental Brief.

Can the Tax Under the Foraker Act be Sustained as Local Taxation?

I.

It has been suggested that Congress has power to impose special taxes in the various districts and territories as "local taxation."

This presumed right is predicated upon the power of Congress to legislate absolutey for such districts and territories.

This power of Congress over districts and territories has been held to be a combination of the Federal power and the State power. It has been held that Congress may do in the territories all that the State could do within its borders. That its relation to the territory is the same as that of a State to one of its counties. That it can do all

that the people can do within a State in accordance with the Constitution of the United States. (Yankton case.)

Assuming all these powers, we must now look at the provisions of the Constitution of the United States upon the subject. They are the following:

Art. 1, Sec. 8. "Congress shall have power to lay and "collect duties, taxes, imposts and excises to pay the "debts and provide for the general welfare of the United "States; but all duties, taxes, imposts and excises shall be "uniform throughout the United States. * * * To "regulate commerce with foreign nations and among the "several States."

Sec. 9. "No tax or duty shall be laid upon ar- "ticles exported from any State. No preference shall be "given by any regulation of Congress to the ports of one "State over those of another."

Sec. 10. "No State shall, without the consent of "Congress, lay any duties or imposts on imports or exports "except what shall be absolutely necessary for executing "its inspection laws; and the net produce of all duties and "imposts laid by any State on imports or exports shall be "for the use of the Treasury of the United States."

What powers therefore has Congress in legislating as a local legislature for the various districts and territories? It has the same powers that a State has within its borders.

The powers of a State within its borders are regulated by its constitution.

The powers of Congress, similar to those of a State, must be regulated by some Constitution. There is no other Constitution to regulate them than the Constitution of the United States. This is clearly what was meant in the case of National Bank *vs.* Yankton, when the Court said Congress had the power of the people in a State in accordance with or subject to the Constitution of the United States.

A State can tax all persons and property within its borders for the local purposes of the State. Congress can tax

all persons within the borders of the given territory for the benefit of the people of that territory. A State cannot tax any persons or property outside the limits of its borders for the benefit of its own citizens, and Congress cannot tax any persons or property outside the limits of a given territory for the benefit of that territory.

In the case of Stoutenburgh *vs.* Hennick, 129 U. S., 141–7, the District of Columbia, which was made a municipal corporation by Act of Congress, was held to have no power to impose a license tax on persons soliciting the sale of goods on behalf of individuals doing business outside the District. This was held to be a regulation of interstate commerce, and to come within the case of Robbins *vs.* Shelby Taxing District, 120 U. S., 429, and Asher *vs.* Texas, 128 U. S., 129.

The Court said that the power granted to Congress to regulate commerce is necessarily exclusive whenever the objects of it are national or admit of only one system throughout the country. * * * That in the matter of interstate commerce the United States is but one country, and is and must be subject to one system of regulation, and not to a multitude of systems. That a State statute requiring persons soliciting for the sale of goods from persons outside of the District to pay a license fee is, in the absence of Congressional action, a regulation of commerce, in violation of the Constitution.

The following quotation from the opinion of Chief Justice Fuller, it has been suggested, leaves open the question whether such an act would have been done by Congress itself which could not have been done by the District of Columbia:

"It is plausibly argued that it is beyond the power of "Congress to pass a law of the character in question solely "for the District of Columbia, because whenever Congress

" acts upon a subject the regulations it established must con-
" stitute a system applicable to the whole country ; but the
" disposition of this case calls for no expression of opinion
" on that subject."

This last quotation can only mean that the point is not decided in that case because it was not of necessity presented. It seems clear, however, from the preceding paragraphs that the Court considered that whenever Congress acted upon a matter of interstate commerce it must be under a system applicable equally and uniformly throughout the whole country. This universal and uniform application of the taxing system is obligatory upon Congress whenever it acts as a Congress of the Nation.

Whenever it acts as a local legislature of a State can it do anything different?

It can in this sense, that as a local legislature for a particular district it can impose a tax within that district and on the inhabitants, but not elsewhere. If such a regulation reaches beyond the district it is no longer a "local regulation," nor within the jurisdiction of Congress acting as a local legislature.

The case of Brown *vs.* Maryland, 12 Wheat., 419, was the case of a law of Maryland requiring a license fee of all importers of foreign goods by bale or package, or of other persons selling such imported goods by the bale or package.

This law was held to be a violation of the Constitutional provision, Art. 1, Sec. 10, prohibiting a State from levying any imposts or duties on imports or exports, and of the 8th Sec., Art. 1, Clause 3, giving Congress the power to regulate commerce with foreign nations and among the several States.

It will be noticed that this was a tax imposed specifically upon the importers of foreign goods and the sellers of such foreign goods received into the State.

The case of Woodruff *vs.* Parham, 8 Wall., 123, was "simply a tax on the sale of merchandise imposed alike on "all sales made in Mobile, whether such sales be made by "citizens of Alabama or of some other State or the goods "sold be the product of that State or of another State. "There is no attempt to discriminate against goods of another "State."

It was urged that the tax was invalid on the ground that it was a tax on an export of another State and therefore obnoxious to the constitutional provision prohibiting any tax on the products of the other States, Brown *vs.* Maryland being relied on as an authority in point.

The Court held that a tax on the imports and exports was an impost within the Constitutional provision and that exports or imports meant goods going to or coming from a foreign country, and did not apply to the States of the Union. They, therefore, distinguished the case of Brown *vs.* Maryland on the ground that in that case the court had not considered the difference between international and interstate commerce and what was said in regard thereto was merely dictum.

The Court, therefore, was of opinion that the tax in question was an excise because it was the intention of the Constitution that if internal taxation should become necessary it was provided for by taxes and excises; taxes referring to direct local taxes and excises to indirect local taxes; the tax being an excise, not an export, the Constitutional objection was of no force.

It was, however, stated that had the tax discriminated against goods coming from another State it would have been a violation of the clause allowing *Congress* to regulate commerce. Brown *vs.* Maryland was as Justice Miller said rightly decided on the ground that "such tax was a direct "tax imposed upon the transportation of goods from one

"State to another over high seas in contrast with that "transfer of goods in transit from one State to another "which was the rule laid down in Crandall *vs.* Nevada." To the same effect is Pervear *vs.* Commonwealth, 5 Wall., 475–481.

II.

But there can be no question that the burden imposed by the Foraker Act is not a local excise but that it is absolutely an imposition of *duties* such as the Constitution requires to be uniform throughout the United States.

Sec. 2, of the bill in question, enacts:

"That on and after the passage of this Act the same "*tariffs, customs and duties* shall be levied, collected and "paid *upon all articles imported into the United States from "ports other than those of the United States* which are re- "quired by law to be collected upon articles *imported into "the United States from foreign countries.*"

The bill continues:

"Provided that on all coffee in the bean or ground im- "ported into Porto Rico there shall be levied and collected "a *duty* of five cents a pound * * * and provided that all "books and pamphlets printed in the English language "shall be admitted into Porto Rico *free from duty* when im- "ported from the United States."

Sec. 3 of the Act provides:

"That on and after the passage of this Act all merchan- "dise coming from Porto Rico into the United States and "going from the United States into Porto Rico *shall be "entered in the several ports of entry upon payment of 15% of "the duties* which are required to be levied, collected and "paid upon like merchandise from foreign countries."

Comment seems superfluous upon this unequivocal language that the tax is one of the "duties" covered by Article 1, section 8 of the Constitution.

But to make the distinction the clearer the language of the bill shows that it had in mind duties as contradistinguished from excises or revenue taxes. For it proceeds:

"In addition thereto upon all articles of merchandise of "Porto Rican manufacture coming into the United States," etc., etc., "upon payment of a tax equal to the payment "of the internal revenue taxes imposed in the United "States upon like articles of merchandise manufactured; "such tax to be paid by the *internal revenue stamp or stamps* "to be purchased and provided by the commissioner of "internal revenue, and to be procured from the collector of "internal revenue at a point at or most convenient to the "port of entry," etc., etc.

The same section further provides:

"That on and after the date when this Act shall take "effect all articles of merchandise except coffee not du- "tiable under the tariff laws of the United States, etc., "etc., shall be admitted into the several ports thereof (of "Porto Rico) when imported from the United States *free* "*from duty.*"

And the bill further provides that when Porto Rico "shall "have enacted and put into operation a system of local "taxation to meet the necessities of Porto Rico", etc., etc., the President "shall make proclamation thereof and there- "after all *tariff duties* on merchandise and articles coming "into Porto Rico from the United States or coming into "the United States from Porto Rico *shall cease.* And from "and after such date all such articles shall be entered at "the several ports of entry *free of duties.*"

Can it seriously be argued after reading the language of this bill that the tax is anything less than the imposition of *duties?*

But if anything further is needed to convince the doubting we would refer to the report of the Committee on the Pacific Islands and Porto Rico upon the bill in question (Report No. 249, Feb. 5th, 1900).

This report states that among the propositions contemplated by the bill is:

"To extend the navigation laws of the United States to "the islands and enact such *tariff*, internal revenue and "other provisions as are necessary to afford a revenue for "the support of the Government." (P. 1 of report.)

The bill, further says the report:

"Provides preferential duties on dutiable articles going "from the United States into Porto Rico, and from Porto "Rico into the United States, and extends to Porto Rico the "internal revenue law and all other laws of the United "States locally applicable." (Pp. 3 and 4.)

The report further says:

"The questions that gave the Committee most concern were "* * * in the second place what provision should be "made with respect to *tariff duties* and internal revenue "taxes" (p. 4).

The bill further says (at p. 6):

"The bill as introduced provided for free trade between "the United States and Porto Rico. This proposition was "objected to on various grounds. It was urged that it was "in violation of the policy of protection. * * * They "do not think * * * that there is in the proposition "any departure from the policy of protection because that "policy has only been maintained between the United "States and the rest of the world. * * * The Committee "were of opinion that there would not result any injury, if "any injury resulted at all, to any industry of the United "States in the entry into the United States free from duty "of all products of Porto Rico. * * * Nevertheless the "Committee, although disregarding these objections, have "thought it best in view of the urgent necessity of "revenue for Porto Rico, to impose on all dutiable articles "imported into Porto Rico from the United States 25 per "cent. of the tariff duties provided by the law passed July

" 27, 1897, and also to impose a similar duty on all articles " *dutiable under said Act* that may be imported from there " into the United States which together with all the in- " ternal revenue taxes that may be levied shall be collected " *for the use and benefit of the treasury of Porto Rico and for the* " *support of the local Government.*"

This makes it not only plain that duties were intended, but it was the application *pro tanto* of the actual tariff law of 1897, enforced through the United States as against foreign goods to the ports of Porto Rico; and it was moreover an imposition of duties not as the Constitution enjoins in Art. 1, Sec. 8, "to pay the debts and provide for "the common defense and general welfare of the United "States," but "for the use and benefit of the treasury of "Porto Rico and for the support of the local government."

III.

If there is any refuge left after this examination of the bill and report, it can only be in the provision of the Constitution, Art. 1, Sect. 10, Clause 2, which provides that: "No State shall without the consent of the Congress lay "any imposts or duties on imports or exports," etc. It might be urged that as the States may with the consent of Congress lay imposts or duties on imports or exports, Congress has by its action, given its consent to the imposition of such imposts and duties by Porto Rico for its local benefit.

It might possibly be an answer to this to say that the Government urges that Porto Rico is not a State nor a territory, but only an appurtenant piece of property belonging to the United States, but we will not accept this argument as we believe Porto Rico to be in the same category as territory.

There is another answer more pertinent and more com-

plete. The same clause of the Constitution cited above continues as follows:

"And the net produce of all duties and imposts laid by "any State on imports or exports shall be for the use of "the Treasury of the United States."

The Foraker bill, Sec. 4, specifically provided that the duties collected under it shall not be converted *into the general fund or treasury*, but shall be held as a separate fund and shall be placed at the disposal of the President to be used for the benefit of the government of Porto Rico until the government of Porto Rico herein provided for shall have been organized, when all moneys theretofore collected under the provisions herein then unexpended *shall be transferred to the local treasury of Porto Rico.*

We do not assent to the proposition stated above as a possible refuge of the Government, that the imposition of this tax could *in any event* be upheld as the imposition of an impost tax, by and with the consent of Congress, but if anybody should be disposed so to hold it, it is very clear that they could not be sustained on this point, there being a specific provision as to the disposition of moneys collected totally at variance with the disposition marked out by the Constitution for the cases where the States with the consent of Congress may impose imposts and duties.

The Question of Jurisdiction.

In reference to the suggestion that the amount involved in this case was insufficient to give jurisdiction to the Circuit Court, reliance is placed on the decision of the Court in Holt *vs.* Indiana Mfg. Co., 176 U. S., 70.

In that case the jurisdiction of the Circuit Court was sought to be sustained under two subdivisions of Section 629 Rev. Stat.

Subdivision *Ninth* conferred jurisdiction in all cases arising under patent and copyright laws and the Court held that the assessment of taxes upon patent rights did not constitute any question arising under the patent or copyright laws.

Subdivision *Sixteenth* conferred jurisdiction in all cases arising under the civil rights law and the denial to any citizens "of any right, privilege or immunity secured by the Constitution." The Court held that the imposition of the tax complained of did not come under that Act.

In the present case the jurisdiction of the Circuit Court is specifically conferred by the *Fourth* Subdivision of Section 629, Rev. Stat., which confers such jurisdiction without reference to any amount in controversy in "all suits at law "or in equity, arising under any act providing for revenue "from imports or tonnage" and in all cases arising under the internal revenue or postal laws.

This statute is conclusive on the jurisdiction.

F. R. Coudert, Jr.
Paul Fuller.

January 7, 1901.

No. 507.—October Term, 1900.

SAMUEL B. DOWNES, ETC.,

vs.

GEORGE R. BIDWELL.

For briefs and arguments in behalf of the United States in this case see No. 456, De Lima vs. Bidwell.